

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Telecommunications)	CC Docket No. 96-115
Act of 1996;)	
)	
Telecommunications Carriers' Use of)	
Customer Proprietary Network Information)	
And Other Customer Information;)	
)	
Implementation of the Non-Accounting)	CC Docket No. 96-149
Safeguards of Section 271 and 272 of the)	
Communications Act of 1934, as Amended;)	
)	
2000 Biennial Regulatory Review - -)	
Review of Policies and Rules Concerning)	CC Docket No. 00-257
Unauthorized Charges of Consumers')	
Long Distance Carriers)	
_____)	

**COMMENTS IN SUPPORT OF PETITION'S FOR RECONSIDERATION
BY THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA),¹ through the undersigned and pursuant to Federal Communications Commission (FCC) Rules 1.429 and 1.419,² hereby submits comments in support of Verizon's Petition for Reconsideration (Verizon's Petition)³ and AT&T Wireless Services, Inc. Petition for Reconsideration (AT&T Petition)⁴ in the above-docketed proceeding. USTA's interest in this proceeding is to ensure that regulatory rules and policies

¹ USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² 47 C.F.R. §§ 1.415 and 1.419.

³ See Verizon's Petition for Reconsideration of the Third Report and Order in CC Docket 96-115, (Oct.21, 2002), *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket No. 96-115 (rel. July 25, 2002) (Verizon Petition).

⁴ See AT&T Wireless Services, Inc. Petition for Reconsideration of the Third Report and Order in CC Docket 96-115, (Oct.21, 2002), *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket No. 96-115 (rel. July 25, 2002) (AT&T Petition).

that are ultimately applied to its incumbent local exchange carrier (ILEC) members are within the limits imposed by Congress in section 222 of the Communications Act of 1934, as amended (the Act).⁵

DISCUSSION

On July 25, 2002, the FCC released its Third Report and Order and Third Further Notice of Proposed Rulemaking in the Customer Proprietary Network Information (CPNI) proceeding (Third CPNI Order).⁶ The FCC adopted an “opt-out”⁷ approach when carriers disclose CPNI to affiliates, third party agents, and joint venture partners providing communications-related services.⁸ In addition, the FCC determined that CPNI disclosure to unrelated third parties or carrier affiliates required opt-in⁹ approval.¹⁰ Finally, the Third CPNI Order affirms the United States Court of Appeals Tenth Circuit ruling¹¹ vacating the CPNI rules associated with “opt-in,” but left intact the remainder of the FCC’s rules, most notably the “total service approach.”¹²

In its Petition, Verizon requests that the FCC “reconsider its order to make clear that all state regulations of CPNI that are inconsistent with federal CPNI rules, including any state rules that adopt an “opt-in” requirement, are preempted.”¹³ Verizon contends that preemption is necessary in order to facilitate the congressional goal of uniform nationwide CPNI rules. In addition, Verizon believes that if the FCC does not act to revise section 222 of its rules, telecommunications carriers will be subject to a “economic patchwork of restrictions and

⁵ 47 U.S.C. § 222.

⁶ See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket No. 96-115 (rel. July 25, 2002) (Third CPNI Order).

⁷ Under opt-out, carriers would be required to provide customers with advance notice that they intend to use a customer’s CPNI and give the customer an opportunity to disapprove of the use.

⁸ Third CPNI Order at ¶ 3.

⁹ Under opt-in, carriers are prohibited from using a customer’s CPNI unless the customer expressly approves the use that the carrier requests the customer to approve in its notice.

¹⁰ *Id.*

¹¹ *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (June 5, 2000) (No. 99-1427).

¹² *Id.* The “total service approach” allows a carrier to use CPNI to market new product offerings within the carrier-customer service relationship, based on the customer’s implied consent.

marketing practices.”¹⁴ Moreover, Verizon contends that the First Amendment mandates preemption.¹⁵

Likewise, AT&T asserts in its Petition “that the Commission reconsider its decision to eliminate its presumption that inconsistent state consumer proprietary network information (CPNI) requirements will be preempted.”¹⁶ AT&T articulates virtually identical arguments that Verizon makes for federal preemption of more restrictive state CPNI rules.

USTA supports the assertions put forth by both Verizon and AT&T in their petitions. We agree with Verizon that the FCC brought national CPNI policy into line when it reassessed its CPNI rules in light of the Tenth Circuit determination in *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999). USTA believes, however, that the national CPNI policy is now in jeopardy because the FCC deviated from its former approach in regards to preemption of state CPNI requirements.

The FCC in the Third CPNI Order reconfirmed its decision to preempt state authority on a case-by-case basis.¹⁷ The FCC determined that it could preempt state regulation of intrastate telecommunications matters “where such regulation would negate the Commission’s exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed from regulation of the intrastate aspects.”¹⁸ The FCC, however, we believe made a critical error in changing its “earlier approach in one respect.”¹⁹ The FCC stated that “{S}hould states adopt CPNI requirements that are more restrictive than those adopted by the Commission, we decline

¹³ Verizon Petition at 1.

¹⁴ *Id.* at 23.

¹⁵ *Id.*

¹⁶ AT&T Petition at 1.

¹⁷ Third CPNI Order at ¶ 69.

¹⁸ *Id.*

¹⁹ *Id.* at ¶ 70.

to apply any presumption that such requirements would be vulnerable to preemption.”²⁰ The FCC did recognize that it “might still decide that such requirements could be preempted, it would not be appropriate for us to apply an automatic presumption that they will be preempted.”²¹ Needless to say, we disagree with the FCC.

The FCC “conducted a *Central Hudson* analysis of the burden of different approval mechanisms on protected speech, balancing carrier and customer rights to commercial speech with consumers’ rights to privacy in their CPNI.”²² The FCC concluded that a change in regards to its preemption approach was instigated by the realization that they did not incorporate an “opt-in” CPNI regime consistent with the First Amendment for intra-company use. We agree with Verizon that “{A}lthough the Commission expressly found that an “opt-in” CPNI regime would violate the First Amendment, it declined to expressly preempt state regulators from enacting more restrictive CPNI regulations.”²³ We agree with AT&T that the FCC’s actions are counter-intuitive.²⁴

As Verizon points out, the Commission has elected to exercise its preemptive authority on a case-by-case basis, reasoning that states might be able to enact more restrictive CPNI regulations based on different records.²⁵ We agree with both Verizon and AT&T that the FCC is now allowing states to adopt stricter CPNI regulations that the FCC found to be unconstitutional. In fact, “the state of Washington has proposed regulations that expressly override section 222 and the Commission’s rules, and are inconsistent with the new federal regulations in several

²⁰ *Id.* Previously, the FCC stated that state rules are “vulnerable to preemption are those that (1) permit greater carrier use of CPNI than section 222 and the Commission’s rules allow, or (2) seek to impose additional limitations on carriers’ use of CPNI.” *CPNI Reconsideration Order* at 14465-66, ¶ 112. *See also CPNI Order* at 8077-78, ¶ 18.

²¹ *Id.*

²² *See Id.* (citing *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 564-65 (1980)).

²³ Verizon Petition at 4. *See Third CPNI Order* at ¶ 31 (stating that “{I}n light of U.S. West we now conclude that an opt-in rule for intra-company use cannot be justified based on the record we have before us”). “Thus, we adopt a less restrictive alternative—an opt-out rule—which is less burdensome on commercial speech.” *Id.*

²⁴ AT&T Petition at 4.

²⁵ *Id.* *See Third CPNI Order* at ¶ 71.

respects.”²⁶ The Washington State proposed regulations do indeed require “opt-in” consent to use CPNI within the same corporate entity or among affiliates.²⁷

USTA believes that the net affect upon telecommunications carriers of the FCC’s preemption standard for CPNI will be a patchwork of rules and regulations in different states that will have trumped the federal CPNI rules. In addition, telecommunications carriers will incur greater costs to implement CPNI regulations that have been found to be in violation of the First Amendment. USTA believes that section 222 of the Act provides adequate protection to consumers. Consequently, the CPNI rules should not be expanded by the states and that the First Amendment requires federal preemption for more restrictive state CPNI rules.

CONCLUSION

For the reasons set forth above, USTA urges the FCC to grant Verizon’s Petition and AT&T’s Petition in order to reconsider its determination that CPNI requirements that are more restrictive than those adopted by the FCC should be preempted.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: _____

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMenamin
Robin E. Tuttle

Its Attorneys

1401 H Street, NW, Suite 600
Washington, D.C. 2005
(202) 326-7300

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²⁶ Verizon Petition at 5.

²⁷ *Id.* See Wa Admin. Code § 480-120-202 (proposed).